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No. 74-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

RICHARD A. GORDON, etc.,
Petitioner,

—against—

NEW YORK STOCK EXCHANGE, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

The issue presented here is not whether the defendant exchanges' long-standing and well-known rules fixing minimum commission rates to be charged by their members constitute unreasonable restraints of trade in violation of the antitrust laws. Rather, the sole issue presented is whether Section 19(b)(9) of the Securities Exchange Act of 1934 ("the Exchange Act") (48 Stat. 881 *et seq.*, 15 U.S.C. § 78a *et seq.*), impliedly repealed Section 1 of the Sherman

Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. § 1) with respect to such rules. More specifically, the questions are:

1. Whether the provisions of Section 19(b)(9) of the Exchange Act (15 U.S.C. § 78s(b)(9)), which authorize exchanges to adopt rules fixing reasonable rates of commission, are inconsistent with and repugnant to the Sherman Act's prohibition against rate-fixing so that the earlier statute must yield to the later.

2. Whether the provisions of Section 19(b)(9), which confer jurisdiction on the Securities and Exchange Commission (the "SEC") to review and require changes in exchange rules fixing rates if necessary to achieve the objectives of Section 19(b), exclude review jurisdiction over such rules by a court applying antitrust standards.*

The questions of whether the fixing of commissions was economically sound or justified, or whether the level of the rates fixed was reasonable, relate only to the exchanges' "rule of reason" defense if the antitrust laws apply but are irrelevant to the sole issue here involved of whether the antitrust laws apply at all to exchange commission rules.

JURISDICTION

Plaintiff's petition for a writ of certiorari was timely filed and defendants-respondents joined in the request for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 19(b)(9) of the Exchange Act (15 U.S.C. § 78s (b)(9)) provides, in pertinent part:

"Sec. 19***(b) The Commission is further authorized, if after making appropriate request in writing

* The District Court decision, granting summary judgment in favor of defendants, is reported at 366 F.Supp. 1261 (S.D.N.Y. 1973). The decision below of the Court of Appeals, unanimously affirming the District Court's judgment, is reported at 498 F.2d 1303 (2d Cir. 1974). All references to the decision of the Court below will be by citation to the Appendix filed in this Court. Reference to the District Court's decision will be by citation to the Supplemental Appendix.

to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as*** (9) the fixing of reasonable rates of commission, interest, listing, and other charges;*** and (13) similar matters."

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:***"

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition

This action was commenced on April 2, 1971, by Richard A. Gordon, individually and purportedly on behalf of an alleged class of investors, against the New York Stock Exchange, Inc. (the "NYSE"), the American Stock Exchange, Inc. (the "Amex"), and Merrill Lynch, Pierce, Fenner & Smith, Inc. and Bache & Co., Inc., as representatives of an alleged class consisting of the defendant exchanges' member organizations. The complaint (A-8 through A-22)* challenged as an illegal price-fixing con-

* References to (A-.....) are to the Appendix and references to (SA-.....) are to the Supplemental Appendix both filed in this Court.

spiracy the long established rules of the defendant exchanges* fixing minimum rates of commission to be charged by their members for transactions in securities listed on their exchanges.** Plaintiff sought injunctive relief, treble damages of $1.5 billion, and an attorney's fee of $10 million. (A-16).

Defendants' answers pleaded as affirmative defenses not only that the exchanges' rules fixing minimum commission rates were exempt from antitrust attack by reason of implied repeal of the Sherman Act by Section 19(b)(9) of the Exchange Act but also that, even in the absence of such implied repeal, such rules were justified under the "rule of reason." (A-20, 26, 33).

Defendants moved for summary judgment on the exemption defense alone. The District Court granted the motion and dismissed the complaint on that ground. The alternative "rule of reason" defense was not involved. (SA-453-465).

The Court of Appeals (per Kaufman, C.J.), rejecting the position of the Antitrust Division of the Department of Justice as *amicus curiae* in support of plaintiff, and adopting the position of the SEC as *amicus curiae* in support of defendants (A-450), unanimously affirmed the District Court's ruling. The grounds of affirmance were that under the rationale of this Court's opinion in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the Sherman Act was

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* While the complaint in this action limits its attack to the fixed minimum commission rules of the NYSE and the Amex, each of the other 11 registered national securities exchanges has rules fixing minimum rates of commission. *See* SEC Exchange Act Release No. 11073, CCH Fed. Sec. L. Rep. ¶ 79,991 at p. 84,522 (Oct. 24, 1974).

** The complaint also attacked the two exchanges' limitations on membership (A-9, 11-12) and pleaded violations of the Robinson-Patman Act (15 U.S.C. § 13(a) *et seq.*) (A-10; see A-12). These claims were dismissed as "essentially frivolous" by the Court below (A-439) and are now abandoned.

impliedly repealed by Section 19(b)(9) of the Exchange Act since the language and legislative history of that section, which permits exchanges to adopt and enforce rules fixing commission rates subject to SEC review and revision, demonstrates congressional intent to exempt such rules from review by an antitrust court under the Sherman Act. (A-442-445).

The Court below expressly disagreed, as did the District Court, with the contrary holding of the Court of Appeals for the Seventh Circuit in *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971). (A-450-451; SA-464-465).

B. The Facts

As evidenced by the Appendix, the factual record before the Court below was ample. It was also undisputed.

Since their founding in 1792 and 1908, respectively, the NYSE and the Amex have at all times had rules, well known to the public, fixing minimum commissions to be charged by their members and member organizations* on transactions in securities listed on their exchanges. (A-42-43; 216-217).

In 1934 the NYSE and the Amex were registered by the SEC as national securities exchanges pursuant to Section 6 of the Exchange Act (15 U.S.C. § 78f) upon findings that the two exchanges' rules (including their minimum commission rules) were "just and adequate to insure fair dealing and to protect investors" and otherwise met the Exchange Act's standards. (A-43, 216-217, 229, 238-239).

Since registration in 1934 the defendant exchanges' commission rules have at all times been subject to the SEC's

* Membership in the defendant exchanges is limited to individuals. "Member organizations" are "member firms" and "member corporations" in which at least one general partner or one director, owning voting stock, is an individual member of the NYSE or Amex.

powers of review and revision under Section 19(b) of the Exchange Act, which authorizes the SEC to request, and if necessary to require, changes in rules fixing commission rates to insure that they are "reasonable" and meet the other criteria of that section.

Since 1934 the NYSE and Amex, either with the approval or at the express direction of the SEC, have amended the provisions of their constitutions and rules prescribing minimum rates of commission a number of times. The most recent NYSE amendments were those which became effective on December 5, 1968, April 5, 1970, April 5, 1971, March 24, 1972, April 24, 1972, September 25, 1973, and February 24, 1974. (A-47-51; 217-218). In each instance the amendments were filed with the SEC not only at the time of their adoption as required under Section 6(a)(4) of the Exchange Act (15 U.S.C. § 78f(a)(4) (A-44), but also in proposed form well in advance of their effective dates, in accordance with SEC Rule 17a-8, in order to "afford an opportunity for orderly Commission consideration of exchange rules before they become effective." SEC Exchange Act Release No. 7253, CCH Fed. Sec. L. Rep. ¶ 76,973 at p. 81,617 (March 3, 1964). (A-39-40; 220-221).

The rules which plaintiff challenged specifically were those in effect from December 5, 1968, to April 5, 1971, and which (1) introduced a volume discount; (2) imposed a temporary service charge on so-called small transactions; and (3) permitted members to set their own rates of commission on portions of orders over $500,000. (A-223; A-47). All of these changes were made either at the specific behest or with the express approval of the SEC (A-220; 355; see generally A-45-52; 98-218; 221-228; 284-417).

On May 28, 1968, the SEC announced that, on the basis of its intensive study of the questions involved commencing as early as 1961, it had determined that "changes in the present commission rate structure are required to benefit the investing public" and ordered public hearings to be

held. (A-45-46; 218-219, 221, 240-248). Expressly invoking Section 19(b) of the Exchange Act, the SEC by letter of the same date requested the NYSE to make certain interim adjustments in its commission rate structure pending a final revision at the conclusion of public hearings. (A-221-222). The SEC sent a similar letter to the Amex. (A-45-46).

Thereafter, the SEC modified its request under Section 19(b) and approved changes in the rules of the defendant exchanges to provide a volume discount on all public orders involving more than 1,000 shares of stock. (A-47; 223).

The subsequent adoption of the interim service charge was also the result of meticulous inquiry and public hearings by the SEC, and was permitted on both exchanges for a limited time (April 1970 until March 1972) to afford relief to the brokerage industry then in financial crisis on condition that the exchanges would ensure that small investors were not discriminated against and that member organizations would take steps to ameliorate their financial problems. (A-223-224; 47; 119-157; 224-226; 48-49; 161-164).

Shortly after the introduction of the interim service charge in 1970, the SEC determined on the basis of its decade-long investigation of the commission rate structure, including two SEC reports (the *Special Study* of 1963 and the *Institutional Investor Study* of 1971)* and two years of testimony adduced at public hearings, in which the Antitrust Division actively participated, that fixed charges for portions of orders above a certain amount were no longer necessary or appropriate under the Exchange Act. (A-226; 350-352; 50; 185-186). In compliance with the SEC's de-

* Report of the Special Study of Securities Markets of the Securities and Exchange Commission, House Doc. No. 95, 88th Cong., 1st Sess. (1963) and Institutional Investor Study Report of the Securities and Exchange Commission, House Doc. No. 92-64, 92d Cong., 1st Sess. (1971).

termination, the NYSE and the Amex each adopted changes in their constitutions in April 1971 which permitted their members to negotiate independently with customers with respect to commission rates on portions of orders in excess of $500,000, while retaining fixed minimum rates at levels below $500,000. (A-50; 206-207; 210; 226-227; 357-361).

Together with these changes in the commission rate structure the SEC approved repeal of the volume discount and the interim service charge and their replacement with a cost-related schedule of fixed commission rates for orders below $500,000 which incorporated a discount for volume transactions. (A-51; 210; 228; 409-410).

The SEC directed the defendant exchanges to monitor the impact of independently negotiated commission rates above the $500,000 level. (A-50-51; 227). After reviewing the monitoring data, the SEC, on February 2, 1972, announced its determination to lower the breakpoint for independent rate negotiation to $300,000 while again retaining fixed minimum rates at levels below $300,000. (A-51; 213-215; 227; 363-404). The NYSE and the Amex complied by making the necessary changes in their respective constitutions and rules, effective in April 1972. (A-51; 214-215; 227-228; 405-408).

• • •

Subsequent to defendants' motion for summary judgment, further action was taken by the SEC, the NYSE and the Amex in connection with the fixing of commissions. Because these matters are significant and of public record, they are described below.

On September 11, 1973, on the basis of its continuing investigation, the SEC announced that it would, in the exercise of its Section 19(b) authority, "act promptly to terminate the fixing of commission rates by stock exchanges after April 30, 1975, if the stock exchanges do not adopt

rule changes achieving that result." SEC Exchange Act Release No. 10383, CCH Fed. Sec. L. Rep. ¶ 79,511 at p. 83,406 (Sept. 11, 1973). In explaining the reasons for this decision, the SEC stated that while the exchanges' system of fixed minimum commissions was authorized by the Exchange Act, because of changes in exchange trading patterns, notably the growth of institutional orders, the SEC had since 1968 looked to the introduction of competitive rates and believed that its policy of prudent gradualism in accomplishing that result now appeared to justify the abandonment of fixed commissions after April 30, 1975. SEC Exchange Act Release No. 10560, CCH Fed. Sec. L. Rep. ¶ 79,603 at p. 83,622 (Dec. 14, 1973).

In response to the SEC's request in February 1974 that the exchanges develop a program fostering "limited price competition" (SEC Exchange Act Release No. 10560, *supra*, at p. 83,622), the NYSE adopted changes in its constitution, effective April 1, 1974, to provide for the elimination of fixed commissions on orders of $2,000 or less. (New York Stock Exchange Member Firm Educational Circular No. 441, March 28, 1974). Similar changes were made in the constitution and rules of the Amex, also effective April 1, 1974. (American Stock Exchange Information Circular No. 29-74, March 29, 1974).

Subsequent to the decision by the Court below, the SEC, on September 19, 1974, invoking its powers under Section 19(b) of the Exchange Act, notified each of the registered national securities exchanges that "the rules and practices of such exchanges that require, or have the effect of requiring, exchange members to charge any person fixed minimum rates of commission, should be eliminated" and formally requested the exchanges to effect necessary changes in their constitutions, rules and practices to that end by November 1, 1974, to be effective on or before May 1, 1975. The SEC stated that if such action were not taken, "the [SEC] will commence appropriate proceedings

promptly to alter or amend the Constitution, rules and practices of such exchanges in the manner described above." SEC Exchange Act Release No. 11019, CCH Fed. Sec. L. Rep. ¶ 79,964 (Sept. 19, 1974).

The SEC thereafter promulgated proposed rules designed to eliminate exchange rules fixing commissions on all transactions and convened public hearings on November 18, 1974. SEC Exchange Act Release No. 11073, CCH Fed. Sec. L. Rep. ¶ 79,991 (Oct. 24, 1974); see also SEC Exchange Act Release No. 11093, CCH Fed. Sec. L. Rep. ¶ 80,007 (Nov. 8, 1974). Those hearings continued through December 17, 1974. On January 23, 1975, the SEC announced its policy conclusions and the adoption of a new rule (Rule 19b-3) providing for the elimination by May 1, 1975, of all exchange rules fixing minimum rates of commission to be charged by members on public transactions in securities listed on an exchange and subsequent elimination by May 1, 1976, of all exchange rules fixing minimum commission rates for intra-member transactions. SEC Exchange Act Release No. 11203 (Jan. 23, 1975); see SEC Rule 19b-3, CCH Fed. Sec. L. Rep. ¶ 79,991 (Jan. 23, 1975). On February 6, 1975, the Board of Directors of the NYSE voted to comply with Rule 19b-3. N. Y. Times, February 7, 1975, p. 39, col. 6.

In its policy conclusions supporting Rule 19b-3 the SEC, while strongly supporting its decision to require the complete abolition of fixed commissions, stated, with respect to the fixing of minimum commission rates by exchanges in the past:

> "The foregoing does not reflect any judgment by the Commission that the fixed minimum commission rate always was bad or that it was, or now is, illegal, or that fixed commissions could never be appropriate in the future. Rather, it simply reflects a conclusion, based upon the Commission's experience and the abundant data alluded to earlier that, under the conditions now existing, fixed minimum commissions should terminate at the times specified in the rule. It is not possible to

predict future developments or future conditions, and it is conceivable that unforeseen developments could require the Commission to reinstitute some form of fixed rates, although the Commission does not anticipate or believe that this will become necessary." SEC Exchange Act Release No. 11203 at p. 26.

Culminating some three years of hearings and investigation, bills effecting a major revision of the Exchange Act which previously failed of passage are again pending before both houses of the Congress. Vol. 121, no. 1, Cong. Rec. H130 (daily ed. January 14, 1975); Vol. 121, no. 4 Cong. Rec. S376 (daily ed. January 17, 1975). Both the bill submitted in the House, H.R. 10, and the bill submitted in the Senate, S.249, seek, by amendment of Section 19(b)(9) of the Exchange Act, to provide for the future elimination of fixed commissions while vesting power in the SEC to permit the continuation of fixed rates under certain circumstances.

SUMMARY OF ARGUMENT

It is common ground that the issue of implied repeal—whether the Congress intended the antitrust laws to apply—is for a court to decide, and the Court below did so. But that issue is a question of law, not of fact.

The questions are simply whether provisions of the regulatory statute are so inconsistent as to be irreconcilable with the commands of the Sherman Act; and whether enforcement of the Sherman Act would intrude upon a domain exclusively marked out by the Congress for the regulatory agency. Under decisions of this Court resolution of these questions turns solely on the ascertainment of Congressional intent which, like all questions of statutory construction, is a matter of law. The Court below correctly adopted this approach.

Both the Solicitor General and the Court of Appeals for the Seventh Circuit in its *Thill* decision erroneously view

implied repeal as dependent on a rule of reason-type trial of economic and factual issues. But that type of inquiry is only appropriate to determine whether the antitrust laws have been violated in situations where they are applicable, not to determine the threshold question of whether they apply. This is precisely what this Court held in *Silver*, where, after deciding that self-regulatory conduct not subject to SEC review was not exempt from the antitrust laws, it ruled that such conduct was subject to the traditional antitrust rule of reason. The *Thill* decision is thus an aberration because it treats the issue of implied repeal as one of fact and, indeed, of policy: *i.e.*, whether the particular rule attacked is necessary to the proper functioning of the regulatory statute. This error stemmed from the *Thill* Court's misapprehension of the true nature of the "necessity" test of implied repeal delineated by this Court in *Silver*. This Court said the test was whether implied repeal of the Sherman Act was necessary to make the Exchange Act work; but the *Thill* Court said the test was whether the particular exchange rule was necessary to make the Act work.

More complete repugnancy between two statutory schemes would be difficult to imagine. Section 19(b)(9) of the Exchange Act authorizes exchanges (organizations of competing brokers) to fix rates of commission, whereas the Sherman Act prohibits rate-fixing by competitors. The same section vests in the SEC jurisdiction to exercise continuing control over this authorized rate-fixing and to require changes in exchange rules fixing commission rates, whereas enforcement of the Sherman Act prohibition against unreasonable restraints of trade is vested in the courts. Section 19(b)(9) is a deliberate exception, as to one specific aspect of a particular regulated industry, to the Sherman Act's pro-competitive policy. The Sherman Act must therefore yield to the subsequent and inconsistent expression of Congressional intent embodied in the Exchange Act.

The *Thill* decision was also in error in holding that the existence of SEC review jurisdiction is not by itself sufficient to establish an implied repeal but a rule-of-reason trial must be held to determine whether the SEC has actively and adequately exercised that jurisdiction. Even if this aspect of the *Thill* interpretation of this Court's *Silver* opinion were correct; that test is more than adequately met by the ample and undisputed evidence in the record. That evidence shows that the SEC has for over a decade actively exercised its review jurisdiction, with the participation of the Antitrust Division, with respect to numerous aspects of the level and structure of commission rates, and has recently ordered the elimination by May 1, 1975, of all exchange rules fixing commissions to be charged non-members, subject to the presently unforeseen possibility of a return to some form of fixed rates.

Principles of public utility regulation have no bearing on the unique system of cooperative SEC-exchange regulation, in which the exchanges take the initiative in adopting rules and the SEC exercises an oversight role. But even if the existence of "pervasive" regulatory power were essential to implied repeal, that test is met here. Regardless whether the entire scheme of the Exchange Act is of "pervasive" regulation, the SEC's power over exchange-fixed commission rates under Section 19(b) of the Act could not be more pervasive. Under that section the SEC has power not only to regulate, as it has done in the past by changing the level and structure of exchange-fixed commission rates, but also power which it has now exercised effective May 1, 1975, to abolish completely the practice of fixing rates, subject to possible reinstitution of some form of fixed rates in the future.

If exchange-fixed minimum commission rates had been unlawful since passage in 1890 of the Sherman Act, despite enactment in 1934 of the Exchange Act and its Section 19(b)(9), it is difficult to understand why the Congress for

the past three years has considered and is still considering amendments to the Exchange Act to outlaw commission fixing, subject to its possible reintroduction by the SEC. Ordinarily, the Congress does not legislate to prohibit conduct which is already unlawful. The inference is irresistible that by considering such amendments to the Exchange Act the Congress has implicitly reaffirmed the intent of the Congress which enacted the Exchange Act to authorize exchange rate-fixing subject to SEC oversight and thereby to repeal the Sherman Act *pro tanto*.

ARGUMENT

I.

In enacting Section 19(b) of the Exchange Act the Congress intended to repeal *pro tanto* the inconsistent pre-existing provisions of the Sherman Act.

A. The Question of Implied Repeal is a Question of Law.

It is undisputed (see S.G.Br., pp. 10-12) that the SEC cannot grant exchanges exemptions from the antitrust laws and that the question of implied repeal is for a court to decide. It is likewise agreed, in light of this Court's decisions* (S.G. Br., pp. 4, 12, 13 and 37; see also, pp. 26-43)

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* Implied repeal presents a question of law, to be decided exclusively by reference to the explicit or inferred congressional intent behind a statute enacted subsequent to the Sherman Act, and not by reference to extrinsic economic evidence relating to the wisdom of the alleged restraint of trade involved. *See e.g.*, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 379 (1973); Pan American World Airways v. United States, 371 U.S. 296, 304, 305, 309-10 (1963); McLean Trucking Co. v. United States, 321 U.S. 67, 79 (1944); Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156, 161-63 (1922); Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437, 446 (1907). Indeed, this is the position espoused by the Solicitor General in his brief in United States v. NASD, Dkt. No. 73-1701 *prob. juris noted*, 43 U.S.L.W. 3185 (U.S. Oct. 15, 1974) (presently before this Court), in which no suggestion is made that implied repeal of the Sherman Act turns on the outcome of a trial of issues of fact and a "rule of reason" analysis.

that the question of implied repeal is traditionally an issue of law to be determined by the Congressional intent to be inferred from the language, structure and relevant history of Section 19(b)(9) of the Exchange Act. Irrelevant to this question is a factual determination as to the economic or regulatory necessity of rate-fixing, which is a policy determination within the province of the Congress and the SEC.

It is further agreed (S.G.Br., pp. 4, 12, 48; see also, pp. 14 and 22) that the traditional and proper tests of a *pro tanto* implied repeal are whether a clear repugnancy exists between the antitrust laws and a subsequent regulatory enactment or whether there is an irreconciliable conflict between the jurisdiction of an antitrust court and the regulatory power delegated by the Congress to an agency.

At this point the issue fundamental to this appeal arises. The Solicitor General argues (S.G.Br., pp. 4, 10, 11, 15-16, 24-26) that this Court's decision in *Silver* has converted the traditional question of statutory interpretation on the issue of implied repeal into a question of fact as regards repeals to be implied from provisions of the Exchange Act. It is urged (S.G. Br. *ibid.*) that *Silver* established the question of necessity in terms of Exchange Act objectives as a new and special test of implied repeal which, it is claimed, is "an aspect of the rule of reason."

The argument stems from a misreading of this Court's opinion in *Silver*, which said nothing of the kind. In *Silver* this Court first decided—as a matter of law, by reference to the relevant provisions of the Exchange Act and its legislative history, and without reference to any factual record on the issue of Exchange Act necessity—that, in part because of the absence of any provision in the Exchange Act giving the SEC power to review the particular self-regulatory conduct there challenged (the particular application of a rule rather than the rule itself) the Sherman Act had not been impliedly repealed as to that particular conduct. 373

U.S. at 357-58. The Court reached this result without applying any "rule of reason" or other principle of antitrust law. Only after it had ruled that no repeal could be implied so as to exempt the particular conduct attacked did the Court proceed to analyze the conduct itself to ascertain whether it was justified under the "rule of reason," *i.e.*, in terms of the objectives of the Exchange Act. 373 U.S. at 360-62. Thus, the "rule of reason" was not utilized as a test of implied repeal but to determine whether the antitrust laws had been violated.

This Court's treatment of the implied repeal issue in *Silver* as a question of law dependent on construction of the Exchange Act was thus wholly consistent with the approach to that issue repeatedly taken in other decisions of the Court, both prior and subsequent. Where antitrust exemptions have not been explicitly set forth in regulatory statutes, a Congressional intent to exempt challenged regulatory conduct from the antitrust laws is nonetheless to be inferred, in particular and discrete instances, where either the terms of the statute are in conflict with the prohibitions of the antitrust laws or where the goals or effective operation of the regulatory statute would be frustrated unless a *pro tanto* repeal of the antitrust laws were implied. *E.g.*, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 379 (1973); *Pan American World Airways* v. *United States*, 371 U.S. 296, 304, 305, 309-310 (1963); *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 161-63 (1922); *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437, 446 (1907); see, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 732 (1973); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439, 456-457 (1945); *United States* v. *Borden Co.*, 308 U.S. 188, 198, 199 (1939).

Here, an implied repeal of Section 1 of the Sherman Act by Section 19(b)(9) of the Exchange Act is dictated

by two considerations: first, the explicit rate-fixing authorization contained in Section 19(b)(9) is repugnant to the prohibition against rate-fixing contained in Section 1 of the Sherman Act (15 U.S.C. § 1); and second, the creation of on-going supervisory power in the SEC over exchange rules fixing commission rates is inconsistent with review of such rules by a court under the antitrust laws.

B. Section 19(b)(9) of the Exchange Act Cannot be Reconciled with the Sherman Act.

1. Section 19(b)(9) Authorizes Exchanges to Adopt Rules Fixing Commission Rates.

In *Silver* this Court referred to Section 19(b) as suggesting the general dimensions of the exchanges' "federally mandated duty" of self-regulation, 373 U.S. at 352-53, and even the *Thill* Court acknowledged that in many respects exchanges have been "delegated governmental authority." 433 F.2d at 266.

Section 19(b) on its face includes the "fixing of reasonable rates of commission" among those self-regulatory activities in which exchanges are authorized to engage.

In granting the SEC the power under Section 19(b)(9) to review exchange rules fixing rates of commission to assure the reasonableness of those rates as well as fulfillment of the other statutory objectives, the Congress manifestly contemplated action by the SEC with respect to rates already set by an exchange. Otherwise there would be nothing for the SEC's review power to act upon. (See p. 26, *infra*). This is also apparent from the statutory requirement that the SEC, as a prerequisite to ordering any revision in rules fixing commissions, must first request an

exchange to "effect on its own behalf" any suggested "changes in its rules and practices".*

Section 3(a)(3) of the Exchange Act (15 U.S.C. § 78c(a)(3)), which is ignored by the Solicitor General, reinforces the view that the Congress intended to authorize exchange rate-fixing and also evidences an intent that such rates be minimum rates. Section 3(a)(3) defines a "member" of a registered national exchange as any person who is permitted to effect transactions on an exchange, *inter alia,* "with payment of a commission or fee which is less than that charged the general public." This provision obviously contemplates that commission rates to be charged the general public will be fixed minimum rates since in the absence of such a minimum rate there would be no basis for determining whether the commission charged a member was "less than" that charged the general public.

Both the Congress and the SEC have so interpreted Section 3(a)(3).

In introducing H.R. 5050 in 1973 (the so-called Moss Subcommittee Bill now pending before the House as H.R. 10), designed, *inter alia,* to repeal the commission rate-fixing authorization in Section 19(b)(9), Representative Moss explained the need for a simultaneous revision of Section 3(a)(3) as follows:

> "Current law includes within this definition [of a member] a person who can make use of the facilities of an exchange to execute a transaction at the so-called 'intra-member rate' (a rate less than the fixed mini-

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* The Solicitor General implicitly acknowledges the existence of statutory rate-fixing authority (S.G. Br., p. 37) but argues that it does not exclude antitrust review by a court. In so doing he abandons the position urged by the Antitrust Division as *amicus curiae* in the Court below that while Section 19(b)(9) authorizes fixing of "reasonable" rates such rates can only be maximum rates. This position was demolished by the SEC in its brief as *amicus curiae* (pp. 18-19) in Kaplan v. Lehman Bros. 371 F.2d 409 (7th Cir.), *cert. denied,* 389 U.S. 954 (1967)—copies of which have been lodged with this Court—was rejected by the Seventh Circuit in that case ("Obviously the fixing of minimum commissions is one method of regulating commission rates." 371 F.2d at 411) and was apparently found so lacking in merit that it was ignored in the opinion of the Court below.

> mum commission rate charged the general public). Since the bill abolishes all fixed minimum commissions, this part of the definition of 'member' is stricken and a new definitional section is added . . . .
>
> "This amendment shall take effect . . . coincident with the mandatory phase-out of fixed rates." (199 Cong. Rec., H1316, March 1, 1973)*

Both the District Court and the Court below ruled that in enacting Section 19(b)(9) the Congress, in the plainest of terms, authorized exchanges to adopt rules fixing commission rates. The District Court said that the "facial language of the Exchange Act gives the Exchange and the Commission the power to 'fix' commission rates." (SA-461). The Court of Appeals, in turn, said that "the 1934 Act explicitly provides for 'the *fixing* of reasonable rates of commission'." (A-439) (emphasis in original).

While acknowledging that where an earlier law is clearly repugnant to a later law, the earlier must give way (S.G.Br., p. 12), the Solicitor General argues that a determination of repugnancy cannot be made in this case without a trial on the issue of whether the fixing of commissions is "necessary" (S.G.Br., pp. 17, 25-26). This argument finds no support in *Silver* (which was itself a summary judgment case), runs counter to all of the implied repeal decisions of this Court, and also is contrary to logic. A clear repugnancy between two statutes either appears from the language used by the Congress or it does not exist.

The Solicitor General also argues (S.G.Br., p. 37) that no repugnancy here exists because "the statutory language itself does not require a fixed commission system." But exempt rate-fixing under regulatory statutes is typically permissive and not mandatory. See, *e.g.*, Interstate Com-

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* As to the SEC's views on Section 3(a)(3), see p. 26, *infra*.

merce Act, 49 U.S.C. § 15(1); Civil Aeronautics Act, 49 U.S.C. §§ 1482(d) and (e); Shipping Act, 46 U.S.C. § 817. Hence, the absence of a requirement that exchanges fix commissions does not negative an implied repeal of the prohibition against price-fixing contained in the Sherman Act. See *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767-68, 774-76, 790, 800 (1968); *Pennsylvania Water & Power Co.* v. *FPC*, 193 F.2d 230, 234-35 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

Presumably, in enforcing the Sherman Act for over eighty years prior to its first challenge of commission rate-fixing by exchanges in *Thill*, the Antitrust Division must have likewise viewed exchange rate-fixing as authorized. Even in the *Thill* case, on which the Solicitor General relies so heavily, the Seventh Circuit described exchange rate-fixing as a "system of authorized price-fixing." 433 F.2d at 270. However, the most that the Solicitor General is now prepared to concede is that "particular instances of price fixing" by exchanges might be "necessary" (S.G.Br., p. 2). This position finds no support in either the language of Section 19(b)(9) ("rules and practices . . . in respect of such matters as . . . the fixing of reasonable rates of commission") or established antitrust principles.

2. The Legislative History of Section 19(b)(9) Demonstrates Congressional Intent that Exchanges Continue to Fix Commission Rates.

The legislative history of Section 19(b)(9) supports the holding of the Court below that the Congress intended to authorize by statute continuation of the exchanges' historic practice of fixing rates of commission, subject only to newly created jurisdiction in the SEC to review and revise such rates.

The Congress had long been aware of the general practice followed by all of the nation's securities exchanges of

setting minimum rates of commission. In 1913, the House Committee on Banking and Currency, headed by Congressman A. P. Pujo, which was considering possible federal regulation of stock exchanges, conducted a broad investigation of many matters, including the operations of the NYSE. The report submitted by the Pujo Committee noted that the fixed minimum commission rule was strictly enforced by the NYSE and that "[t]he acknowledged objective is to prevent competition amongst the members." *Report of the Committee Appointed Pursuant to House Resotions 429 and 504 to Investigate the Concentration of Control of Money and Credit,* H.R. Rep. No. 1593, 62d Cong., 2d Sess. 39 (1913). The Committee did not merely indicate an awareness of prevailing practice; it went on to approve it:

> "As regards the rates of commission enforced by the exchange your Committee believes the present rates to be reasonable, except as to stocks, say, of $25 or less in value, and that the exchange should be protected in this respect by the law under which it shall be incorporated against a kind of competition between members that would lower the service and threaten the responsibility of members." (*Id.* at 115).

When the Exchange Act was under consideration by the Congress some twenty years later, in testimony before the Senate Committee on Banking and Currency and the House Committee on Interstate and Foreign Commerce, the long-standing practice of exchanges of fixing minimum commission rates was repeatedly referred to both by members of those committees as well as by witnesses representing the various exchanges. See *Hearings Before Senate Committee on Banking and Currency on Stock Exchange Practices,* 73rd Cong., 2d Sess., Pt. 13, 6075, 6080 (1934); *Hearings Before House Committee on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720,* 73rd Cong., 2d Sess., pp. 320-31, 423-24 (1934). Similarly, the exchanges' prac-

tice of fixing minimum commission rates was specifically and repeatedly mentioned in the House and Senate debates. See 78 Cong. Rec., 8087, 8092, 8490, 8493-94 (1934).

What eventually became Section 19(b)(9) was originally contained in Section 18(c) of two separate bills, S. 2693 and H.R. 7852 (73rd Cong.), which provided:

> "The [Federal Trade] Commission may fix or prescribe the method of fixing uniform rates of commission."

It is true that the word "uniform" was later replaced by the word "reasonable", presumably at the suggestion of Mr. Samuel Untermyer (S.G. Br., pp. 30-31), who argued that the bill should make it clear that the Commission itself could fix rates. However, the important point is that the Congress did not adopt the suggestion that a government agency be empowered to fix rates, but instead adopted the language of Section 19(b)(9) continuing this power in the exchanges, with the SEC having review authority.

The Court below correctly inferred (A-443-444; see A-449-450) that the Congress intended to render inapplicable to exchange rate-fixing this Court's decision in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). The Solicitor General attempts to cast doubt on this inference by suggesting that in 1934 it was still unclear whether "exchange transactions were within the reach of the Federal Commerce Power." (S.G. Br., p. 47) But this doubt can hardly be ascribed to a Congress which was using that very power to enact the Exchange Act and thereby to regulate exchanges.

Recent Congressional activity adds further support to the conclusion by the Court below that Section 19(b)(9) was intended to permit rate-fixing by exchanges. The District

Court, after reviewing the then pending legislation, reintroduced in the current session, remarked:

> "Moreover, recent developments in Congress regarding the commission structure support the holding here. The Senate recently rejected amendments to the 1934 Act which would have mandated the elimination of fixed commissions within two years. See 119 Cong. Record, S11385-6, June 18, 1973. It is reasonable to infer from the proposal of these amendments that Congress did not believe fixed commissions were already illegal under the anti-trust laws, and, of course, the rejection of the amendments suggests that Congress does not now regard fixed rates as offensive to the Exchange Act or the anti-trust laws." (SA-464).

Obviously, if exchange rate-fixing were already illegal, the Congress would not be debating proposed legislation to prohibit such conduct. In particular, it would not be considering amendments of Section 19(b)(9) of the Exchange Act to strike the word "commission" and of Section 3(a)(3) to redefine the term "member" if it did not believe that these provisions authorize exchange rate-fixing, which the sponsors of the proposed legislation are seeking to eliminate.*

The Solicitor General argues from the express prohibition against commission rate-fixing by associations of securities brokers or dealers contained in the 1938 Maloney Act amendment to the Exchange Act that the Congress did not intend to exempt rate-fixing by registered exchanges from the antitrust laws (S.G. Br., pp. 32-35). But the Maloney Act proves precisely the contrary.

The Maloney Act amendment, adopted some four years after the Exchange Act, for the first time authorized the

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*See discussion at pp. 11, 18-19, *supra*.

establishment of associations of brokers and dealers operating in the over-the-counter market and placed them under SEC supervision. Section 15A(b)(7) of the Maloney Act (15 U.S.C. § 78o-3(b)(7)), providing that rules of such associations may not "impose any schedules or fix minimum rates of commission," marked a deliberate distinction between the over-the-counter market (essentially a dealer market) and the registered exchange auction markets, essentially broker markets. It was because, in the absence of such an express prohibition, newly organized associations registered under the Maloney Act might have been assumed to have the same rate-fixing power as historically exercised by exchanges, that the Congress negated any such authority. Exchanges, on the one hand, and associations operating in the over-the-counter market, on the other, were recognized as serving basically different purposes and were therefore endowed by the Congress with different powers.

As noted by the SEC in its brief as *amicus curiae* (p. 30, fn. 53) in the *Kaplan* case, the Maloney Act makes it clear that when dealing with a situation where the Congress felt it in the public interest to prohibit commission rate-fixing it specifically did so. In amending the Exchange Act in 1938 and expressly prohibiting the fixing of commissions by newly formed associations of brokers and dealers, the Congress deliberately chose not to amend Section 19(b)(9) to prohibit fixing of commissions by exchanges, as it could easily have done if it had intended that result.

3. The SEC Has Consistently Intepreted Section 19(b)(9) as Authorizing Continued Exchange Rate-Fixing.

Under well-recognized principles, the "contemporaneous administrative construction" must "carry the day against doubts that might exist from a reading of the bare words of a statute." *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958); see *United States* v. *American Trucking Assns, Inc.*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products*

Co. v. *United States*, 288 U.S. 294, 315 (1933); *cf.*, *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

Since the adoption of the Exchange Act, the SEC has consistently interpreted Section 19(b)(9) as vesting in exchanges rate-making authority subject to the SEC's power to order changes or modifications.

In its 1963 Report of the Special Study of Securities Markets ("Spec. Study"), House Doc. No. 95, 88th Cong., 1st Sess., the SEC said:

> "Both the level and structure of commission rates are established by rules of the various exchanges and are encompassed in the Commission's statutory authority with respect to 'the fixing of reasonable rates of commission' (sec. 19(b)(9) of the Exchange Act)." (Spec. Study Pt. 2, p. 294)
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> ". . . the statutory scheme . . . vests ratemaking initiative in the exchanges and a residual, albeit continuing, responsibility of oversight in the Commission." (Spec. Study Pt. 2, p. 329)
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> ". . . The first step is that an exchange adopts rules fixing rates of commission. If changes are deemed necessary or appropriate, the Commission is to present an 'appropriate request' in writing for specified changes. Compliance by the exchange presumably ends the matter, but if the exchange does not accede, the Commission is empowered, after appropriate notice and opportunity for hearing, 'by rules of [sic] regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of *** (9) the

fixing of 'reasonable' rates of commission***.' " (Spec. Study Pt. 2, p. 344)

In its 1966 *amicus* brief in the *Kaplan* case the SEC observed:

> "These provisions of the Exchange Act [§§ 3(a)(3) and 19(b)(9)] make it plain that while broad supervisory and residual powers and ultimate regulatory jurisdiction over the areas enumerated by Section 19(b) rest with the Commission, Congress imposed directly on the exchanges themselves the duty to take the regulatory initiative in enacting rules which conform to the standards of the Act. Since Section 19(b)(9) expressly vests the Commission with power to alter or supplement the rules of an exchange in respect of 'the fixing of reasonable rates of commission,' it follows that Congress contemplated that exchanges would have and enforce such rules . . . The Congressional intent that the exchanges have and enforce rules establishing commission rates is also evidenced by Section 3(a)(3) of the Exchange Act, 15 U.S.C. 78c(a)(3), which defines the term 'member,' when used with respect to an exchange, as, among other things, a person who is permitted to make use of the facilities of the exchange without the payment of a commission or fee or 'with the payment of a commission or fee which is less than that charged the general public.' This presupposes that commissions or fees would be established collectively in some way by members of an exchange and further that members would pay lower commissions than nonmembers, a result which would hardly follow if the commissions paid by everyone were determined individually by each member." (p. 15).

More recently, on December 14, 1973, the SEC reiterated this view:

> "[T]o the extent any such rules are appropriate, the promulgation of rules concerning exchange-required

fixed commission rates is a matter that Congress entrusted to the exchanges in the first instance, at least as long as the fixing of commission rates should be permitted." SEC Exchange Act Release No. 10560, *supra*, CCH Fed. Sec. L. Rep. ¶ 79,603, at p. 83,620.

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Thus, it is clear from the face of Section 19(b)(9), from its legislative history and from its consistent interpretation by the SEC that the Congress, far from outlawing rules of exchanges fixing minimum rates of commission or rendering them subject to the Sherman Act's stringent prohibitions against rate-fixing, deliberately included this long-standing practice within the scope of an exchange's self-regulatory authority, subject to review and revision by the SEC, and therefore by implication necessarily repealed the Sherman Act *pro tanto*.

The Court below, in reaching its decision that a repeal of the Sherman Act was necessarily implied in this case, was thus on firm ground when it said, after a careful and extensive consideration of the Exchange Act and its history:

> "Exemption from the antitrust laws with regard to the fixing of minimum rates of commission is . . . mandated by both the language and the legislative history of the 1934 Act, and in particular § 19(b) (9) . . ." (A-44-45).

Contrary to the Solicitor General's assertion (S.G.Br., p. 13), the Court below did not ignore the "guiding principle" of implied repeal set forth in *Silver*. That guiding principle is the familiar one that, while repeals by implication are not favored, they will nevertheless be found where the later statute is plainly inconsistent with the earlier one. (See pp. 15-16, *supra*).

The Court below not only properly applied *Silver* but also correctly followed this Court's more recent application

of the implied repeal doctrine in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), in which it was said:

> "The *Pan American* case is consistent with the view expressed in Silver v. New York Stock Exchange, 373 U.S. 341, 360-361, that while [sic] a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances by implication grant immunity from an antitrust claim." 409 U.S. at 385, n. 14.

The decision below is also squarely in accord with an earlier decision by the Seventh Circuit on the very same issue involved here, which held exchange commission rate-fixing exempt from the antitrust laws. *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (N. D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

4. The *Thill* Decision Misapplied the Traditional Test of Implied Repeal of the Antitrust Laws.

Plaintiff and the Solicitor General (P.Br., p. 5; S.G. Br., pp. 15, 16, 24, 25) rely heavily on *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), with which the Court below disagreed in part because the *Thill* Court had misconstrued this Court's restatement in *Silver* of the traditional test of implied repeal by confusing implied repeal with the particular rule involved in applying the "necessity" test.* In *Silver*, this Court declared:

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* The Solicitor General also cites (S.G. Br., pp. 15, 24, 26, 34-35, 45) Harwell v. Growth Programs, Inc., 451 F.2d 240 (5th Cir.), *opinion on reh'g*, 459 F.2d 461, *cert. denied*, 409 U.S. 876 (1972); Fredrickson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 5 CCH Trade Reg. Rep. 1974-2 Trade Cas. ¶ 75,227 (N.D. Ill. Sept. 9, 1974), *interlocutory appeal stayed pending this Court's decision herein*, Dkt. No. 74-2030 (7th Cir., order entered Jan. 3, 1975); Zuckerman v. Yount, 362 F. Supp. 858 (N.D. Ill. 1973). But these three cases, two of which were decided by District Courts in the Seventh Circuit, did not more than follow *Thill's* erroneous reasoning.

> "Repeal is to be . . . implied only if necessary to make the Securities Exchange Act work, . . ." 373 U.S. at 357.

But the Seventh Circuit said that repeal is to be implied only if an exchange

> ". . . establish[es] its anticompetitive conduct as justified because it is necessary for the operation of the Securities [sic] Act.
>
> • • •
>
> "[an exchange is] required to establish, if possible, that the conduct complained of was necessary to make the Securities [sic] Act work." 433 F.2d at 273.

In *Thill,* while not attacking the practice of minimum rate-fixing as such, the plaintiff, a non-member broker, claimed that the NYSE had violated the antitrust laws by prohibiting its members from sharing commissions with non-members (including non-member brokers) or granting to non-members any rebate or discount from the fixed minimum rate (the so-called "anti-rebate rule"). The District Court, relying on this Court's decision in *Silver* and on the Seventh Circuit's decision in *Kaplan,* granted summary judgment in favor of the NYSE on the ground that the anti-rebate rule, being an integral and necessary part of the NYSE's minimum commission rules, was likewise exempt from the Sherman Act by reason of Section 19(b)(9) of the Exchange Act. CCH 1969 Trade Cas. ¶ 72,911 (E.D. Wis., Aug. 26, 1969) (not officially reported).

The Court of Appeals for the Seventh Circuit—by a 2 to 1 decision, generating three separate opinions—reversed. It held that before repeal of the antitrust laws by the Exchange Act could be implied, there had to be a trial in which the NYSE had the burden of proving that its anti-rebate rule was necessary to make the Exchange Act work.

Judge Campbell, writing for the majority in *Thill,* attempted to distinguish *Kaplan*—as does the Solicitor Gen-

eral (S.G. Br., pp. 24-26)—as holding only that exchange rules fixing commissions are not subject to attack as *per se* illegal under the Sherman Act. 433 F.2d at 268-69. But when read as a whole, the decision of the District Court in *Kaplan* (affirmed in a brief opinion by the Seventh Circuit) cannot be so understood. What the Court was clearly saying was that the fixing of rates, as such, because expressly authorized by Section 19(b)(9), could not be held illegal, nor could the level of the rates be subjected to antitrust review by a court. There is simply no other way to read the *Kaplan* case, or to distinguish it from the *Thill* case, and Judge Pell's dissent in the *Thill* case makes this very point. 433 F.2d at 277-78.

Significantly, in its recent decision in *Schaefer* v. *First National Bank of Lincolnwood*, decided January 30, 1975, 5 CCH Trade Reg. Rep., 1975 Trade Cas. ¶ 60,137 at p. 65,379, the Seventh Circuit, in dismissing an antitrust claim, said, ignoring *Thill*, that "Private parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review."

II.

By giving the SEC the power to review and revise exchange rules fixing commission rates under standards of the Exchange Act, the Congress likewise manifested its intention to exclude review and revision by a court applying antitrust standards.

The plain repugnancy between Section 19(b)(9) of the Exchange Act and the Sherman Act dictates the conclusion that the Congress intended to repeal, by implication, the latter statute as regards the practice of exchange rate-fixing. This conclusion is buttressed by the presence of agency review power over that practice.

A. The Grant of Agency Review Power Over Commission Rates Precludes Judicial Review Under the Antitrust Laws.

In *Silver*, this Court, in holding that the NYSE's severance of the plaintiff's private wire connections to NYSE members was not exempt from the antitrust laws, emphasized the importance of the fact that the SEC lacked the power to review this aspect of the NYSE's regulatory activity. It concluded that this lack of SEC jurisdiction removed the serious concern that assertion of antitrust jurisdiction could otherwise create a "conflict of coextensiveness with the agency's regulatory power," thereby rendering the self-regulatory scheme ineffective. 373 U.S. at 358.

The Solicitor General erroneously infers that the absence of SEC review power made it "unnecessary to consider whether the primary jurisdiction doctrine was applicable." (S.G. Br., p. 18). A fair reading of *Silver* makes it clear that it was not a "primary jurisdiction" case, but an "exclusive jurisdiction" or "exemption" case, and the Court found no need to consider the doctrine of primary jurisdiction. 373 U.S. at 358. The Court clearly saw SEC jurisdiction as relevant to the exemption issue:

> "Should review of Exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented. See note 12, *supra*." 373 U.S. at 360.

In note 12 the Court said:

> "Were there commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, . . . a different case would arise concerning exemption from the operation of laws designed to prevent anti-competitive activity, an issue we do not decide today." 373 U.S. at 358, n. 12.*

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* In arguing that the "different case" reserved in *Silver* was a case of primary jurisdiction, the Solicitor General omits and necessarily overlooks the last, and obviously crucial, part of this sentence regarding exemption. (S.G. Br., p. 19).

Thus, in holding that the presence of SEC power to review exchange rules fixing commissions made theirs the "different cases" as to antitrust exemption—not as to primary jurisdiction—the Seventh Circuit in *Kaplan* and the Court below in this case correctly applied this Court's rationale in *Silver*.

The Solicitor General, however, argues (S.G. Br., p. 20) that *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), is *Silver's* "different case", even though *Ricci* did not reach the issue of implied repeal but dealt only with primary jurisdiction. What Ricci complained of was that the Chicago Mercantile Exchange had improperly transferred his membership to another trader, by means of a blank transfer authorization that had allegedly previously been revoked. The complaint charged that this action violated the rules of the Chicago Mercantile Exchange, the Commodities Exchange Act and, almost as an afterthought, the antitrust laws. 409 U.S. at 290-91.

The Seventh Circuit, *sua sponte*, issued a stay and directed referral of the case to the Commodities Exchange Commission. This Court affirmed, giving three reasons: 1) the district court, in subsequent proceedings, would have to determine whether the regulatory scheme of the Commodity Exchange Act was incompatible with the maintenance of an antitrust action based upon self-regulatory conduct undertaken pursuant to that Act; 2) some aspects of the antitrust dispute were concededly within the statutory jurisdiction of the Commission; and, 3) "adjudication of [the facts in] dispute by the [Commission] promise to be of material aid in resolving the immunity question." 409 U.S. at 302.

In *Ricci* this Court did not rule on the claim of antitrust exemption. All that this Court suggested was that, based on the facts to be developed by the Commission on the primary jurisdiction reference, a court would be in a

better position, if any further proceedings were necessary, to make a determination with respect to any claimed antitrust immunity. Here no facts are in dispute or need to be developed regarding the question of implied repeal, and therefore *Ricci* is inapposite.

The decision of the Court below* is also consistent with other decisions by this Court holding that where the conduct at issue in an antitrust case constitutes the basic ingredient of an agency's regulatory authority, a plaintiff must rely upon the administrative remedies provided by the Congress rather than on the antitrust laws. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American Airways* v. *United States*, 371 U.S. 296 (1963); *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1932).

In *Cunard* this Court said:

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." 284 U.S. at 485.

In *Pan American* this Court observed:

> "The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking

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* The decision was followed in Abbott Securities Corp. v. New York Stock Exchange, 5 CCH Trade Reg. Rep. 1974-2 Trade Cas. ¶ 75,324 (D.D.C., Oct. 30, 1974) at p. 98,029.

> them, and in allowing or disallowing affiliations between common carriers and air carriers." 371 U.S. at 305.

Pointing out that the Congress had created a regulatory regime under a special "public interest" standard and entrusted the CAB, not the courts, with the enforcement of that standard, the Court concluded that antitrust repeal was necessitated by the regulatory statute because "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 310.

The principle of *Pan American* was reiterated and applied in *Hughes*, in which this Court said:

> ". . . In this context, the authority of the Board to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field." 409 U.S. at 385 (footnote omitted).*

The Solicitor General suggests (S.G. Br., p. 48) that even if there is a prospective conflict between the SEC and the courts, this Court can circumvent that problem by recognizing in the decree the SEC's power to order exchanges to engage in conduct prohibited by the decree, citing *Otter*

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* Plaintiff (as did the *Thill* Court) relies on United States v. Philadelphia National Bank, 374 U.S. 321 (1963) (P. Br., p. 7). But as the Court below noted, there are significant differences between that case and this one. (A-451, n.11). In *Philadelphia National Bank* this Court found no conflict between the Bank Merger Act and the Clayton Act. It also found that the legislative history of the Bank Merger Act evidenced a Congressional intent to have the antitrust laws continue to apply to bank mergers (374 U.S. at 352). A further distinction is that here Congress has granted the SEC continuing oversight jurisdiction over the conduct challenged (*see* FMC *v. Seatrain Lines, Inc.*, 411 U.S. 726, 732 (1973)), while the Bank Merger Act vested no such authority in the Comptroller of the Currency.

Tail Power Co. v. *United States,* 410 U.S. 366 (1973). But by suggesting that the SEC has the final say with respect to rate-fixing by exchanges the Solicitor General in effect concedes that the SEC has exclusive jurisdiction in this area and that the courts have no useful role to play.

B. A Finding of *Pro Tanto* Implied Repeal Requires no Pervasive Regulatory Scheme.

It is also argued (S.G.Br., pp. 9, 16, 35, 37) that a repeal of the antitrust laws should not be implied in this case because the Exchange Act allegedly does not create a pervasive, comprehensive, "public utility-like" regulatory scheme. This principle has no application since no claim is made that the regulatory scheme at issue is so all-encompassing as to leave no room for application of the antitrust laws, although it could be argued that the scope of Section 19(b) is so "comprehensive" as to cover virtually all aspects of an exchange's rules, and the SEC has so interpreted it. SEC Release No. 9950, January 16, 1973, 38 Fed. Reg. 3902; SEC Exchange Act Release No. 11203, *supra,* at 4-5.

It is defendants' position that a repeal of the Sherman Act must be implied *pro tanto* to give effect to the Congressional intent evidenced in Section 19(b)(9) to permit SEC-supervised exchange rate-fixing. This requires no "pervasive" scheme. As this Court explained in its *Hughes* decision, a regulatory scheme not sufficient to grant a blanket exemption from the antitrust laws may, nevertheless, do so in particular and discrete instances. 409 U.S. at 592, n. 14. Numerous regulatory statutes have been held to confer exclusive jurisdiction on an agency over some matters, while denying exclusivity to the agency in regard to matters which are amenable to complementary forms of

regulation, such as the antitrust laws.* Compare, *e.g.*, *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), and *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1952) with *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) and *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959). In none of those cases did this Court lay down the rule that implied repeal of the Sherman Act required "public utility-like" regulation.**

The Solicitor General argues that no adequate record was made below and that summary judgment was therefore inappropriate (S.G. Br., p. 26). However, a factual record concerning "necessity" or the adequacy of the exercise of SEC review power is not the touchstone of implied repeal. In *Silver*, too, summary judgment had been granted and this Court did not suggest that this was inappropriate in a case involving implied repeal of the antitrust laws.

It is also argued, citing *Thill*, that the mere existence of review power in the SEC is insufficient to support a determination of implied repeal (S. G. Br., p. 25). However, even if the *Thill* interpretation of this Court's *Silver* opinion were correct—that the existence of SEC review jurisdiction is not by itself sufficient for implied repeal but a trial must be held to determine whether the SEC has actively and adequately exercised that jurisdiction—that test is more than adequately met by the ample and undisputed evidence in the record. That evidence shows that the SEC for over a decade has been diligently exercising its review jurisdiction through public hearings in which the Antitrust Division participated, and through investigations, studies and communications with the exchanges with respect to numerous aspects of the level and structure of commission

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* The Solicitor General argues (S.G.Br., p. 45) that the antitrust laws supplement, rather than conflict with, the Exchange Act in the same way as private enforcement of the SEC's proxy rules supplement SEC action. However, it is clear that in the latter case dual enforcement is for the purpose of securing compliance with the same standards of conduct, while here the antitrust laws and Section 19(b)(9) of the Exchange Act prescribe contradictory standards of conduct.

** As the SEC has pointed out, there are numerous and important differences between regulation in the securities industry and traditional public utility regulation. Special Study Pt. 2, pp. 328-29.

rates. (A-45-52; 98-215; 221-228; 294-417) The result has been a continuous series of significant changes in the fixed commission system ordered or approved by the SEC, including the introduction of competitive rates first above the $500,000 level, then above the $300,000 level, and then at or below the $2,000 level, all under the SEC's deliberate policy of prudent gradualism. These steps, after monitoring of their effects, have now culminated in an SEC rule requiring the complete abolition of fixed rates by May 1 of this year subject to possible reinstitution of some form of fixed rates in the future. SEC Exchange Act Release No. 11203, *supra*.

The Solicitor General, however, apparently considers anything less than a formal order by the SEC to be insufficient to result in implied repeal, although conceding that if there were such an order "no antitrust liability could arise." (S.G. Br., p. 48). But Section 19(b) does not contemplate direct SEC regulation by formal order but contemplates, instead, a system of exchange self-regulation with power in the SEC to request changes in exchange rules only if necessary or appropriate to comply with the statutory standards. See *Silver* v. *New York Stock Exchange, supra,* at 352-55. If no change is deemed necessary, there is nothing for the SEC to do, and the exchange rules are permitted to stand. No express approval is required. *Exchange Buffet Corp.* v. *New York Stock Exchange,* 244 F.2d 507, 510 (2d Cir. 1957). Even if a change is necessary the SEC must first request such change and only proceed by rule or order if an exchange refuses to comply with the request.

Thus, while it is true that no formal order has been entered by the SEC with respect to exchange rules fixing commission rates, it is equally clear from the record that every step taken by the exchanges with respect to commission rates since 1968 has been at the express direction or request of the SEC as contemplated by Section 19(b) of the Exchange Act. Under these circumstances, by reason of the exchanges' voluntary compliance, a formal order would be

superfluous. It would hardly serve the objectives of cooperative SEC-exchange regulation established by the Exchange Act to require the exchanges to refuse, in every case, to accede to the SEC's 19(b) requests and to require the SEC to direct changes in exchange rules by formal order so that the exchanges could be free from antitrust attack.

If the Solicitor General's position were to be upheld, in the absence of a formal SEC order exchange self-regulation would necessarily be subjected to dual, and possibly conflicting, regulation by the SEC and the courts, since every rule or practice of an exchange, even after thorough review and express approval or modification by the SEC, would be subject to a *de novo* review by a court or a jury in a collateral antitrust action. Such a result would clearly chill self-regulation by exchanges, thereby frustrating the objectives of the Exchange Act.

As observed by the District Court in *Kaplan:*

> "To subject the Exchange to the perils of treble liability, retroactively imposed, upon the variant decisions of different courts in determining the reasonableness of rates would inevitably disrupt the congressional plan designed to bring order to the marketing of securities." 250 F. Supp. at 566.

III.

Plaintiff has a non-antitrust remedy and forum.

As recently held by the Seventh Circuit, "Private parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review." *Schaefer* v. *First National Bank of Lincolnwood, supra.*

Plaintiff claims, however, that unless collateral antitrust review is permitted, SEC action with respect to exchange rules fixing commission rates can never be subject to independent judicial scrutiny. (P. Br., pp. 5-7). He relies, in part, on two unreported decisions, each of which was ren-

dered without opinion. *Independent Investor Protective League* ["*IIPL*"] v. *SEC*, Dkt. No. 71-1924 (2d Cir., *dism'd without opinion*, Nov. 15, 1971); *IIPL* v. *SEC*, Dkt. No. 71-1984 (D.D.C., *filed*, Oct. 1, 1971, *dism'd without opinion*, June 19, 1972). The grounds for dismissal of those actions not having been disclosed, it cannot be said that the decisions stand for any discernible proposition of law.

In any case, it is clear that plaintiff has a right to obtain review of the SEC's exercise of its Section 19(b) jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 500, 551 *et seq.* (the "APA"). Section 6(a) of the APA authorizes any "interested person" to appear before an agency to present his views. 5 U.S.C. § 555(b). In addition, Section 4(d) permits such a person to petition an administrative agency for the issuance, amendment or repeal of any "rule," defined by Section 2(c) to include the "approval or prescription for the future of rates." 5 U.S.C. §§ 553(e), 551(4). Section 10 provides for district court review of any administrative action, broadly defined by Section 2(g) to include any form of action or failure to act. 5 U.S.C. §§ 702, 551(13).

In arguing (S.G. Br., p. 28) that there is no procedure under the Exchange Act to challenge exchange rules, the Solicitor General overlooks the APA and *Independent Investor Protective League* v. *New York Stock Exchange*, 367 F.Supp. 1376 (S.D.N.Y. 1973), where the Court said:

> "If plaintiff wishes to influence or change Exchange policy [or rules], his remedy is to petition the SEC to exercise its powers under § 19(b) of the [Exchange] Act to recommend changes in Exchange rules, or to alter or amend the rules. The Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(e) provides that '[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.' If plaintiff is 'aggrieved' by SEC action [or

> inaction] relating to Exchange rules, the APA § 10, 5 U.S.C. § 702 gives him the opportunity for judicial review." 367 F.Supp. at 1377.

Finally, the Solicitor General alludes to the SEC's earlier unsuccessful denial that its "19(b) letters" to exchanges requesting changes in their rules constitute "agency action". (S.G. Br., pp. 39-41). But the SEC's former position has been judicially rejected in *Independent Broker-Dealers' Trade Association* v. *SEC*, 442 F.2d 132, 143 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971), and its present position is to the contrary. (See SEC brief as *amicus curiae* filed with this Court).

CONCLUSION

As Mr. Justice Stewart noted in dissenting with Mr. Justice Harlan from the majority opinion in *Silver:*

> "The purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry. This self-initiating process of regulation can work effectively only if the process itself is allowed to operate free from a constant threat of antitrust penalties. To achieve this end, I believe it must be held that the Securities Exchange Act removes antitrust liability for any action taken in good faith to effectuate an exchange's statutory duty of self-regulation." 373 U.S. at 371.

The Court below correctly determined that the Congress, in enacting Section 19(b)(9) of the Exchange Act, intended to repeal, by implication, the Sherman Act to the extent that

the latter statute would otherwise prohibit commission rate-fixing by exchanges, subject to SEC oversight and revision powers.

Accordingly, this Court should affirm the decision below.

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Respectfully submitted,

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